Supreme Court, U.S.
FILED
SEP 10 2001
CLERK

(3)

No. 00-1891

In The
Supreme Court of the United States

George C. Samson, et al.

Petitioners,

v.

Apollo Resources, Inc,
doing business as Apollo Services Inc;
Jeffrey A. Reddoch and Chiquita Reddoch

Respondents,

On Petition for Writ of Certiorari
To The United States Court of
Appeals For The Fifth Circuit

Petitioners' Reply to Brief in Opposition

William L. Melancon
LAW OFFICES OF WILLIAM MELANCON
Versailles Centre, Suite 700
102 Versailles Boulevard
Lafayette, Louisiana 70501
(337) 233-8600
Attorney for Petitioners

14 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION 1

The Trial Record Shows That Apollo's Opposition Brief Has Misstated And Expanded The Record To Generate Sympathy And To Divert The Court's Attention From The Real Issues Presented In Petitioners' Cert Petition 3

Norman Landry's Absences 5

Absences Of George Samson, Kevin Smith And Melvin Smith 6

Other Mischaracterizations By Apollo 8

Summary And Closing 9

TABLE OF CITED AUTHORITIES

Cases

Anderson v. Mt. Clemens Pottery Co.,
328 U.S. 680 (1946) 5

Brooklyn Savings Bank v. O'Neil,
324 U.S. 697 (1945) 6, 8

Overnight Motor Transportation Co., Inc. v. Missell,
316 U.S. 572 (1942) 9, 10

Reich v. Southern New England Telecommunications Corp., 121 F.3d 58, 66-68 (2nd Cir. 1997) 5

Federal Statutes

29 U.S.C. § 201, et seq. 10

29 U.S.C. § 207 9

Regulations

29 C.F.R. § 778.114 ..... *passim*

Other Authorities

Department of Labor, Wage & Hour Opinion Letter
Ruling No. 479 (May 18, 1966),
Labor Law Rep. (CCH) ¶30,997.18,
reprinted in Gilbert J. Ginsburg, et al.,
Fair Labor Standards Handbook
app. III at 104 (1996) 1, 2, 3, 4, 5

Department of Labor, Wage & Hour Opinion Letter
dated 5/26/82 (Unreported) 2, 4

Department of Labor, Wage and Hour Opinion Letter
dated 2/27/95, 1995 WL 1032466 ..... 2, 6, 9

Department of Labor, Wage and Hour Opinion Letter
dated 3/28/96, 1996 WL 1031769 ..... 2, 6, 9

Department of Labor, Wage and Hour Opinion Letter
dated 12/24/97, 1997 WL 998050 ..... 2, 6, 9

Department of Labor, Wage and Hour Opinion Letter
dated 4/20/99, 1999 WL 1002390 ..... 2, 6, 9

Department of Labor, Wage and Hour Opinion Letter
dated 5/28/99, 1999 WL 1002415 ..... 2, 6, 9

REPLY TO BRIEF IN OPPOSITION

In its Opposition Brief, Apollo reargues its version of the facts, many of which were not accepted by the trial and appellate courts. Apollo's strategy is apparent; it reargues its case: (1) to try to characterize Petitioners' cert petition as one involving improper fact-finding when the Court and the parties agree as to all pertinent facts; (2) to generate sympathy with the Court to divert attention from the fact that Apollo blatantly ignored the Department of Labor's warnings that Apollo's payment policies violated 29 CFR § 778.114; and (3) to divert the Court's attention from the facts to which the parties and the lower courts agree. This cert petition is based only on those facts which the parties and the lower courts are in agreement.

The parties, the trial court and the appellate court all agree that Apollo docked its employees' guaranteed salaries when they missed work for personal business.[1] The parties, the trial court and the appellate court all agree that the 1966 Dept. of Labor (DOL) Opinion Letter No. 479 expressly prohibits 778.114 salary deductions when an employee misses work due to "illness, personal business, or other reasons."[2] (Recall that under 29 CFR § 778.114, an employer is allowed to pay only

---

[1] In its Opposition Brief, Apollo does not dispute that Apollo docked Norman Landry's salary for his three pre-approved absences to take care of personal business. Apollo also admitted at trial that it docked other employees' salaries when they missed work for personal business and that it had a policy of doing so. TT p. 53, ln 8-12; TT p. 1221, ln 8-15. Apollo does dispute that it docked its employees salaries when they missed work due to illness but this cert petition is not based on those deductions. At trial, Apollo's president admitted that the DOL, in its investigation, found that Apollo made improper deductions. TT p. 1180, ln 7-18; p. 19, ln 12-18.

[2] *See*, Dist. Court's Add'l Reasons for Judgment, App. p. 48a; Appellate Court Opinion, App. p. 17a. (Appendix Items in Petitioners' Original Brief are cited as "App." in this brief.)

half-time for overtime hours, instead of time and one-half, but in return, the employer must guarantee the full weekly salary even when the employee does not work forty hours.) The trial and appellate courts both ruled that DOL Opinion Letter No. 479 was somehow overruled by later DOL opinion letters issued in 1969 and 1982 that allow employers to make disciplinary deductions.[3]

The lower courts then created their own standard for when deductions could and could not be made in 29 CFR § 778.114 payplans. The Trial Court stated: "This Court finds that an employer using the FWWM may take deductions from an employee's salary where the employee absents himself from work for personal reasons, other than sickness or an accident." Dist. Court's Add'l Reasons for Judgment at App. p. 49a. (The appellate court affirmed the District Court's ruling. App. pp. 17a-19a.)

The trial court's ruling of law contradicts DOL Opinion Letter No. 479 and later DOL opinion letters. The very 5/28/99 DOL Opinion Letter cited by Apollo in its Opposition Brief clearly states that while disciplinary deductions may be made for "willful absences or tardiness," deductions "for absences for personal business or routine sickness" may not be made in 778.114 payplans. Apollo's Opp. Brief App. pp. 4a-5a.

It is undisputed that in their rulings, both the trial and appellate courts completely ignored DOL opinion letters issued in 1995, 1996, 1997 and 1999 that restate and affirm the language of DOL Opinion Letter No. 479 prohibiting salary deductions when employees miss work due to illness, personal business or other reasons. *Appendix Items G-J, pp. 58a -71a.* The petitioners cited these later opinion letters to the Fifth Circuit and how they reiterate the language in DOL Opinion

---

[3] Appellate Court Opinion, App. pp. 17a-19a. Referring to DOL Opinion Letter No. 479, the trial court stated "I don't care what that opinion letter says." TT p. 1191, ln 21-24.

Letter No. 479. In their Petition for Panel Rehearing to the Fifth Circuit, the plaintiffs even summarized and quoted the operable language from these later opinion letters, pointing out to the Court that these letters unequivocally demonstrate that the DOL had not abandoned its ruling in DOL Opinion Letter No. 479, but the Fifth Circuit refused to grant the rehearing even after being shown that it had made an error of law. In contradiction to the respondents' statement in its opposition brief, the petitioners did ask the Fifth Circuit to request an amicus brief from the DOL, but the court refused.

The Trial Record Shows That Apollo's Opposition Brief Has Misstated And Expanded The Record To Generate Sympathy And To Divert The Court's Attention From The Real Issues Presented in Petitioners' Cert Petition

In its Opposition Brief, Apollo has implied that there is disagreement as to the facts in an attempt to portray this petition as unworthy for review. However, as to the critical facts pertinent to this cert petition, there is no disagreement. Apollo either admitted to the facts on the stand or the trial court made a finding of fact.

In its Opposition Brief, Apollo has implied that it was not "cited" by the Department of Labor (DOL). However, on the stand, under questioning by plaintiffs' counsel and by the trial court, Apollo admitted several times that it was indeed cited by the Department of Labor for not following the requirements of 29 CFR § 778.114. TT p. 9, ln 9 - 12; p. 29, ln 5-14.[4] Apollo does not dispute that the DOL citation was signed by the DOL investigator and his supervisor and that

[4] Apollo admitted that the DOL found that Apollo had taken improper deductions from its 778.114 payplans and was cited for taking improper deductions. TT p. 19, ln 12-18.

Apollo was cited as owing $385,915 to 65 employees.[5] TT p. 18, ln 6-14. The DOL investigation and its subsequent discussions with Apollo lasted twelve months so the investigation was not cursory. On the stand, Apollo admitted that the DOL was applying the standards set out in DOL Opinion Letter No. 479. TT p. 55, ln 22 - p. 57, ln 16; p. 79, ln 6-15. Apollo also admitted, on the stand, that it tried to dissuade the DOL from its position, arguing that those standards were supplanted by the 1982 "Otter Letter," but the DOL refused to abandon the standards set out in DOL Opinion Letter No. 479. TT pp. 49-52, p. 57, ln 9 - 16.

Apollo does not dispute that the DOL sent 16(b) letters to the affected employees.[6] This is further proof that Apollo was cited because the DOL would not have been allowed to send these letters if it had not indeed first cited Apollo. At trial, Apollo's expert, a former DOL investigator, admitted that the DOL does not send 16(b) letters if they have concerns that back wages are not actually due. TT p. 13, ln 6-10.

In its Opposition Brief, Apollo quotes Don Strobel (its trial expert and the person who Apollo hired in 1995 to represent them during the DOL investigation) as saying that the DOL's investigation was "poor." Strobel's sole reason for saying that the investigation was "poor" was because the DOL

---

[5] In its Opposition Brief, Apollo correctly notes that the DOL's First Corrected Report was not submitted, but in its brief, Apollo fails to mention the Second Corrected Report which was issued. The Second Corrected Report was the one that was signed by the DOL investigator and his supervisor and was the report that was issued to Washington. This report shows that 65 employees were owed $385,915. Apollo itself acknowledged that the Second Corrected Report was issued because it paid $6,671 in back-wages based on this report.

[6] In its Opposition Brief, Apollo says that these were "modified" 16(b) letters but 16(b) letters are often modified from the "standard language" to encompass the individual facts of the investigation, employer and employees.

did not interview every single affected employee. TT pp. 32-33. However, the DOL is not required to interview every single employee; in fact, the DOL need only interview a small percentage of employees if that is enough to uncover improper policies. *E.g., Reich v. Southern New England Telecommunications Corp.*, 121 F.3d 58, 66-68 (2nd Cir. 1997)(a representative sample of 2.5% is enough), *citing, Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)(8 of 300, or 2.7% of the employees is sufficient). Further, the DOL did not need to interview any employees to determine that Apollo was taking improper deductions because, in its conversations with Strobel, Strobel admitted that Apollo had taken deductions that violated DOL Opinion Letter No. 479. TT p. 53, ln 8-12; p. 79; p. 130, ln 21-24; p. 61, ln. 9-22; pp. 49-52; pp. 56-57.

In its Opposition Brief, Apollo alleges that the DOL's Solicitor's Office chose to not prosecute because the investigation was flawed but, on the stand, Strobel admitted that Apollo did not know why the DOL chose to not prosecute the case themselves. TT p. 29, ln 5-14. As noted in petitioners' principal brief, the DOL Solicitor's office is extremely understaffed and cannot prosecute all meritorious claims.

Norman Landry's Absences

Apollo does not dispute that there were only four weeks where Norman Landry worked less than forty hours and that Apollo chose to dock his guaranteed salary in three of those weeks. Apollo does not dispute that the first week involved a one-day absence to move his family; the second week involved a one-day absence for medical testing to determine the cause of severe headaches; and the third week involved a one-day vacation. In its Brief in Opposition, Apollo states that these absences were not excused (i.e., approved with pay) but Apollo does not dispute that they were pre-approved, Apollo just says that they were pre-approved without pay. The trial court found

that Landry talked with his supervisor, Apollo's operations manager, prior to each of the absences and the absences were pre-approved by the operations manager. TT p. 1190, ln 14-16; p. 1191, ln 10 -p. 1192, ln 11; 868, ln 8-10, p. 869, ln 9-24; p. 871, ln 10 - 19.[7] Since the absences were pre-approved, they cannot be considered "willful" or meriting a disciplinary deduction.

The lower courts found that Apollo's deductions from Landry's salary were allowed because, even though the absences were pre-approved, they involved personal business. Appellate Court Opinion at App. pp. 17a-19a; Dist. Court's Add'l Reasons For Judgment, App. pp. 48a-49a. But their "rule of law" is in direct contradiction to ALL recent DOL opinion letters, including the 1999 DOL opinion letter cited by Apollo in its Opposition Brief.

In its Opposition Brief, Apollo mentions that at trial, Landry stated that he would have been willing to forego the day's pay for the day he had to move his family, but that is irrelevant. An employer must comply with all wage and hour laws, even if an employee is willing to accept less. *E.g.*, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). If an employer wants to take advantage of the 778.114 payplan to pay only half-time for overtime hours, it must also pay the full guaranteed salary when the employee misses work due to illness, personal business or even vacation. 12/24/97 DOL Opinion Letter 1997 WL 998050 (App. p. 58a).

Absences Of George Samson, Kevin Smith And Melvin Smith

This cert petition does not rest on any of the salary

---

[7] Further, Apollo did not object to the introduction of letters from Dr. Patrick Sonnier's and Dr. Harold LeDoux's offices showing that on July 5, 1995, Landry missed work because they were performing tests to determine the cause of his severe headaches. Plaintiffs' Trial Ex. 51.

deductions Apollo made to George Samson's, Melvin Smith's or Kevin Smith's 778.114 salaries. In its Opposition Brief, Apollo spent much text justifying these deductions. Therefore, a short response is justified. At trial, Apollo's president stated that he made the determination to dock their guaranteed salaries when he heard a rumor that Samson and the Smiths were playing hooky together. TT p. 1162, ln 18 - p. 1163, ln 6; p. 1158, ln 2-6. However, it is undisputed that the three individuals missed on different days.[8]

This "hooky story" has little credibility given the fact that all of Apollo's internal records, which were completed by Apollo management, say that the employees were "sick" on the days in question.[9] In its investigation, the DOL found that Apollo took salary deductions even when employees were sick. Apollo's president even admitted that in its investigation, the DOL also found that Apollo docked its employees' salaries when they sent them home because they did not have enough work for them. TT p. 1180, ln 7-18. The weeks Samson and the Smiths were docked were some of the slowest weeks in Apollo's history. TT pp. 1168-71; Plaintiffs' Trial Ex. 57, pp. AR0967-77.[10]

---

[8] In its Opposition Brief, Apollo states that the absences were "near simultaneous" and "around the same weekend." But employees cannot be playing hooky together if they miss on different days. It is undisputed that George Samson missed on 10/19/95 and 10/20/95; Melvin Smith missed on 10/20/95 and Kevin Smith missed on 10/23/95 and 10/24/95.

[9] Apollo's own "Tracking Reports," "Absentee Rosters," and "Attendance Calenders" for each employee all list Samson and the Smiths as being "sick" and "sick/no-pay" on the days their salaries were docked. Plaintiffs' Trial Exhibits 10, 39, 41, 48 & 49.

[10] There is no allegation that Landry was playing hooky and the lower courts found that Apollo's deductions from Landry's salary were allowed because, even though those absences were pre-approved, they

Contrary to Apollo's insinuations, the trial court never ruled that these employees were not sick, that they were playing hooky or even that they failed to bring in a doctor's excuse (because one does not always go to a doctor when one is sick and Apollo admitted that doctor excuses were often misfiled). Instead, the trial court ruled that if an employee was improperly paid, he/she had a duty to complain. MJML Tr. p. 47, ln 10-14. This misstates the law as there is no duty to complain. *E.g.*, *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945). Nevertheless, even though Apollo's internal records indicate that Apollo knew these employees were sick and the trial court stated an improper rule of law, this cert petition does not rely on the Samson and Smith salary deductions.

Other Mischaracterizations By Apollo

Apollo's insinuations that the plaintiffs did better financially under its 778.114 payplan than they would have under a conventional (time and one-half) payplan is ludicrous. Apollo's president admitted that the thirty original plaintiffs averaged 60 hours per week. TT pp. 1132-35. While there were some weeks where employees worked less than 40 hours and were still paid their full salary, there were a similar number of weeks where employees worked 80 hours or more. Id.[11]

Simple math shows that if someone is working 60 hours per week, he/she makes more money if they are paid time and one-half for overtime hours as opposed to only half-time. Using Apollo's hours, the plaintiffs calculated that Apollo

---

involved personal business. MJML Tr. p. 49, ln 17-24; p. 63, ln 24 - p. 64, ln 2. Appellate Court Opinion at App. pp. 17a-18a. (MJML Tr. refers to the transcript for Apollo's Motion for Judgment As a Matter of Law - Trial Record Volume 24.)

[11] Of the 640 weeks worked by the thirty original plaintiffs, there were 94 weeks where they worked 80 hours or more. In 27 of those weeks, the employee worked 90 hours or more. TT p. 1135, ln 8-16.

would owe them over $150,000 under the conventional, 29 U.S.C. §207, time and one-half payplan. The DOL calculated that the 65 employees in its investigation would have made nearly $400,000 more under a conventional payplan.

Apollo would have the Court believe that, even though the plaintiffs' allegations, the testimony at trial and the DOL's fact-findings all support each other, all thirty plaintiffs and the DOL conspired against Apollo to bring a trumped up case. Again, one of the reasons for the mischaracterizations is to divert the Court's attention from the fact that there is no disagreement that Apollo docked Norman Landry's and other employees' 778.114 guaranteed salaries when they missed work to take care of personal business, that Apollo admitted that it had a policy of docking its employees' salaries when they missed work for personal business and that DOL Opinion Letters published in 1966 and the late 1990's all prohibit employer's from docking their employees' 778.114 salaries when they miss work for personal business.

Summary And Closing

The trial and appellate courts found that taking off for personal business was a "willful absence" subject to disciplinary deduction. However, the DOL, in its opinion letters and in its citation of Apollo, has unequivocally stated that under 778.114 payplans, missing work for personal business is not a willful absence and not subject to disciplinary deduction. The trial and appellate courts made an error of law which needs correction by this Court.

The Court should choose to hear this case as all the facts concerning Apollo's docking for personal business were admitted to and confirmed by the lower courts in their opinions. 778.114 cases are very expensive and very few cert petitions reach the Court as evidenced by the fact that in the last twenty years only three 778.114 issues have been presented to the Court for cert; none were granted. Since the *Overnight Motor*

Transportation Co., Inc. v. Missell, 316 U.S. 572 (1942), decision 59 years ago, the Court has issued no opinions clarifying this case or 29 CFR § 778.114. As such, the appellate and district courts have been free to shape the law governing 778.114 payplans as they see fit and their rulings have expanded employer rights well beyond those anticipated or allowed by *Overnight Motor* and the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. The fact that Apollo's employees averaged 60 hours per week makes this an appealing case for the Court to illustrate the abuse that can occur with an unregulated 778.114 payplan; Apollo saved hundreds of thousands of dollars by paying half-time for overtime as opposed to time and one-half.

Another reason for granting the writ application of this case is to define the amount of deference that is due an agency regulation that was enacted in response to a judicial opinion as opposed to a legislative act. 29 CFR § 778.114 was promulgated by the DOL as a direct response to this Court's *Overnight Motor* opinion. Oral argument may not even be necessary, since Apollo is citing DOL opinion letters stating the very rule of law advocated by the petitioners.

For the foregoing reasons, and those stated in Petitioners' Original Brief, certiorari should be granted.

Respectfully submitted,

/s/ _____

William L. Melancon
LAW OFFICES OF WILLIAM MELANCON
Versailles Centre, Suite 700
102 Versailles Boulevard
Lafayette, Louisiana 70501
(337) 233-8600

Attorney for the Petitioners